IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 1

R. SIMPSON & CO. INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER

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Of Counsel.

SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF STATUTES CITED

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The Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit, October Term, 1941, Docket No. 147, was rendered on June 19, 1942. It is to be found on page 49 of the record herein; the case is reported in 128 Fed. (2d) 742.

The opinion of the United States Board of Tax Appeals, B. T. A. Docket No. 98208, was rendered on May 14, 1941. It is to be found on pages 28-30 of the record herein; the case is reported in 44 B. T. A. 498, No. 80.

Jurisdiction

1. The statutory provision believed to sustain jurisdiction is Section 240 of the Judicial Code as Amended by the Act of February 13, 1925 (C. 229 sec. 1, 43 Stat. 938).

2. The judgment sought to be reviewed was entered on July 6, 1942 (R. 50).

3. The proceeding in which review is sought was initiated in the United States Board of Tax Appeals. It involved: (1), asserted liability of the petitioner for personal holding company taxes under Section 351 of the Revenue Acts of 1934 and 1936, respectively, and (2) asserted liability of the petitioner for penalties for failure to file Form 1120-H (personal holding company return).

4. On November 9, 1942, this Honorable Court denied certiorari.

5. On June 7, 1943 a motion for rehearing was granted by this Honorable Court and the prior order denying certiorari vacated. The petition herein, for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit was granted, limited, however, to the second question involved (see paragraph "3" immediately *supra*)—i. e. the asserted liability of the petitioner for penalties for failure to file Form 1120-H (personal holding company return).

6. In its aforesaid order allowing certiorari, this Honorable Court requested counsel to discuss the question of the jurisdiction of this Court to grant a petition for rehearing in this case, comparing the case of *Helvering* v. *Northern Coal Co.*, 293 U. S. 191 (79 L. Ed. 281, 55 S. Ct. 3) and also Section 1140 of the Internal Revenue Code. Said Internal Revenue Code, section 1140 (formerly Sec. 1005, Revenue Act of 1926) reads, so far as pertinent hereto, as follows:

> "Sec. 1140. Date When Board Decision Becomes Final.
>
> The decision of the Board (of Tax Appeals) shall become final—
>
> * * * * *
>
> (b) Decision Affirmed or Petition for Review Dismissed—
>
> * * *

(2) Petition For Certiorari Denied.—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) After Mandate of Supreme Court.—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

* * *

(c) Definitions—As used in this section—

(2) Mandate.—The term 'mandate', in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate."

Pre-existing Body of Law

A legislative act is, of course, always to be considered with reference to the pre-existing body of law, to which it is added and of which it is thenceforth to form a part.

The power to grant rehearings is inherent in appellate courts, including this Honorable Court.

Bronson v. *Schulten*, 104 U. S. 410, 26 L. Ed. 797.

("* * * It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them *during the term* at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. * * *".) (Emphasis supplied).

Accordingly, this Court has promulgated its Rule 33 reading as follows:

"A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, *unless the time is*

shortened or enlarged by order of the court, or of a justice thereof when the court is not in session, and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines." (Italics added.)

A petition for certiorari is not finally "denied" until the lapse of the period during which this Honorable Court permits a petition for rehearing (i. e., in the situation where, as in the cause at bar, motions for leave to file, out of time, petitions for rehearing are proper, until the *end of the term*).

Cf. *Ortiz* v. *Public Service Commission*, 108 F. (2d) 815 (1940; CCA-1).

(Circuit Judge Magruder, writing for an unanimous court, said: "'It is well settled that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decrees does not take final effect for the purposes of the writ of error or appeal.' *Northern Pacific Railroad Co.* v. *Holmes*, 1894, 155 U. S. 137, 138, 15 S. Ct. 28, 29, 39 Led. 99; *Chicago Great Western Railroad Co.* v. *Basham*, 249 U. S. 164, 167, 39 S. Ct. 213, 63 L. Ed. 534; *Joplin Ice Co.* v. *United States*, 8 Cir. 1936, 87 F. (2d) 174, 175.")

If, on such rehearing, the Court (as in the cause at bar) vacates its order denying certiorari and grants review of course no petition for certiorari has been finally "denied".

Applicable Principles of Statutory Construction

It is an ancient maxim of the law that "interpretare et concordare legis legibus est optimus interpretandi modus", that is, to interpret, and (to do it in such a way as) to har-

monize laws with laws, is the best method of interpretation.

Stoughter's Case, 8 Coke 169a.

Hence arises the rule that, in case of any doubt or ambiguity, a statute is to be so construed as not only to be consistent with itself throughout its whole extent, but also to harmonize with the other laws relating to the same or kindred matters, forming a complete, consistent and intelligible system, and also *so as not to conflict with the general and established principles of the law, whether statutory or unwritten.*

United States v. *Babbitt*, 1 Black 55, 17 Led. 94; *Lowe* v. *Yolo County Water Co.*, 8 Cal. App. 167, 96 Pac. 379.

This is specifically true as to taxing statutes also: *Chicago M. & St. P. R. R. Co.* v. *United States*, 127 U. S. 406; *Landrum* v. *United States*, 118 U. S. 81.

Thus a statutory rule must be construed consistently with the whole system of *pleading and practice*, of which it forms a part.

McDougald v. *Dougherty*, 14 Ga. 674.

And, therefore, statutes are to be read in the light of the common law and construed with reference thereto and the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law.

Arthur v. *Bokenham*, 11 Mod. 148.

("The general rule in the exposition of all acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any

alteration in the common law further or otherwise than the act does expressly declare; and therefore in all general matters the law presumes the act did not intend to make any alteration, for if the Parliament had had that design, they would have expressed it in the act.")

And again, if a statute makes use of a word or a phrase, the meaning of which is well known at common law, the word should be understood in the statute in the same sense in which it was understood at common law.

McCool v. *Smith*, 1 Black 459, 17 L. Ed. 218.

For example, although the descent and distribution of property is entirely governed by statute, yet the common law may be considered in construing the act.

Truelove v. *Truelove*, 172 Ind. 441, 86 N. E. 1018, 27 L.R.A. (N.S.) 220.

It is also true that, although the federal courts have no common-law jurisdiction, all their jurisdiction being conferred by the Constitution and the acts of Congress, yet in construing such statutes, the rules of interpretation furnished by the common law are the true guide and have been uniformly followed.

Rice v. *Railroad Co.*, 1 Black 358, 17 L. Ed. 147.

Where a word or phrase has a judicially settled meaning it will be presumed that Congress in using that word or phrase in an act, used it in that sense.

United States v. *Merriam*, 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69;
United States v. *Anderson*, 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69.

The legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors or to intro-

duce a fundamental change in long-established principles of law.

Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239;
Graham v. *Van Wyck*, 14 Barb. (N.Y.) 531.

(A statute authorizing married women to hold, convey, and devise real property the same as if sole, will not empower a married woman to convey to her husband, by deed, her dower rights in his real estate. The Supreme Court of New York, in making this decision, said that the legislature could not have intended "*so violent an innovation upon the existing law;*" the safer and more reasonable construction would restrict the right of a married woman to convey to persons other than her husband.)

It will be recalled that in case of doubt taxing statutes are construed most strongly against the taxing authority and in favor of the citizen.

Gould v. *Gould*, 245 U. S. 151;
Smietanka v. *First Tr. & Savgs. Bank*, 257 U. S. 602;
American La France Fire Engine Co. v. *Riordon*, 6 Fed. (2d) 964;
Empire Fuel Co. v. *Hays*, 295 Fed. 704;
Bankers Trust Co. v. *Bowers*, 295 Fed. 89;
U. S. v. *Thompson*, 189 F. 939;
Miller v. *Gearin*, 258 Fed. 225;
United States v. *Merriam*, 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69;
United States v. *Anderson*, 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69;
Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 71 L. Ed. 676, 47 S. Ct. 389.

And, obviously, this strict rule of construction is especially applicable to statutes which impose penalties.

Augusta Com. Bank v. *Sandford*, 103 Fed. (2d) 98.

Construction of Internal Revenue Code Section 1140 With Reference to the Cause at Bar

In the light of this pre-existing body of law (discussed *supra*) to the effect that a petition for certiorari is not finally "denied" by this Honorable Court until the end of the term during which the petition is initially refused and bearing in mind the applicable principles of statutory construction, what effect, if any, does the existence of the provisions of Internal Revenue Code Section 1140 (set forth *supra*) and the decision in the case of *Helvering* v. *Northern Coal Co.* 293 U. S. 191 have on the jurisdiction of this Honorable Court to grant a petition for rehearing in this case?

Examining the provisions of said Internal Revenue Code Section 1140 set forth *supra*, it is seen that, while it provides that the decision of the Board of Tax Appeals shall become final upon the "denial" of a *petition for certiorari*, it does not, as it *does* in the case of issuance of a mandate by this Honorable Court, make an explicit definition and limitation of the prior rule as to effect of finality.

This is the distinction between the cause at bar and the case of *Helvering* v. *Northern Coal Co.*, 293 U. S. 191 (which the Court has requested us to compare)—for there it was said, as to a *mandate*, in the per curiam opinion, "In view of the authoritative and *explicit* requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied" (Italics added).

In other words, the statute under examination was drafted in the light of the timehonored principle, adhered to by this Honorable Court (see *Bronson* v. *Schulten*, *supra*) that an order is not finally "denied" until the end of the term. In the case of a *mandate* the draftsman inserted, as this Court has pointed out in *Helvering* v. *Northern Coal Co.* *supra*, an "authoritative and explicit requirement" altering and limiting the effect of the rule, that a matter, being

within the breast of the Court, is not final until the end of the term, by the following provisions:

> "The decision of the Board shall become final—
>
> * * *
>
> (b) Decision Affirmed or Petition for Review Dismissed.—
>
> * * *
>
> (3) After Mandate of Supreme Court.—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.
>
> (c) Decision Modified or Reversed.—
>
> (1) Upon Mandate of Supreme Court.—If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected."
>
> I. R. C. Sec. 1140.

But in the very same section (I. R. C. Sec. 1140) in which he placed this authoritative and explicit requirement" as to the finality of a mandate the draftsman made no definition and limitation as to the period during which a *petition for certiorari* was not finally "denied." It surely cannot be said that, under the circumstances, this was an oversight for the very mention of the restrictions upon the operation of the ordinary rule as to the finality of a *mandate* excludes a similar change as to the finality of a denial of a *petition for certiorari*, where the draftsman has attempted to impose no "authoritative and explicit requirement", or, indeed, any change at all, as to the latter—for, as was said in the

case of *Arthur* v. *Bokenham*, supra "if the Parliament had that design they would have expressed it in the act."

Hence we submit that, in the words of the opinion in *Graham* v. *Van Wyck*, supra, "the legislature could not have intended so violent an innovation upon the existing law" as to limit the time-honored rule as to the finality of this Honorable Court's refusal of certiorari without "authoritative and explicit requirement" therefor; that the "denial" of a petition for certiorari within the meaning of I. R. C. Sec. 1140 means a *final* denial; that there had been no such final denial when certiorari was granted on rehearing herein; and that this Honorable Court has jurisdiction to review the cause herein.

We are strengthened in this conviction by the dictum in *Sweet* v. *Commissioner of Internal Revenue*, 120 F. (2d) 77, 80, where Judge Magruder writing for a unanimous bench said:

> "We add this qualification because it might possibly be held that a petition for certiorari is not finally denied within the meaning of Section 1005 (a) (3) (of the Revenue Act of 1926, now I. R. C. Sec. 1140 (b) (2) without change) until the lapse of the brief stated period during which the Supreme Court by its rules, invites a petition for rehearing. Cf. Ortiz *v.* Public Service Commission, 1 Cir., 108 F. 2d. 815, 816 (discussed *supra*)."

Indeed it is not free from doubt that Congress could, even if it had so chosen (and we submit it has not), oust this Honorable Court from jurisdiction to grant an effective rehearing after an initial refusal of certiorari, for it has often been held that while Congress can prohibit a court from hearing a case at all, it cannot authorize such a court to hear a case and at the same time prevent the court from hearing it according to the supreme law of the land.

> See *United States* v. *Hodson*, 7 Cranch 31, 34;
> *Gordon* v. *United States*, 117 U. S. 697, 701-702, 704;

In re Debs, 158 U. S. 564, 594;
Kansas v. *Colorado*, 206 U. S. 46, 82;
United States v. *Evans*, 213 U. S. 297;
United States v. *Klein*, 13 Wall. 128, 146-147;
Ross v. *United States*, 8 App. D. C. 32, 37, 40;
Stephens v. *Cherokee Nation*, 174 U. S. 445, 478;
Muskrat v. *United States*, 219 U. S. 346, 362;
Keller v. *Potomac Electric Power Co.* 261 U. S. 428, 444;
Kilbourn v. *Thompson*, 103 U. S. 168, 190-191.

Statement of the Case

The facts are not in dispute. R. Simpson & Co., Inc., the petitioner herein, "was incorporated under the laws of New York on July 1, 1918. * * * It was qualified to conduct a general pawnbroking and loan business upon pledges of personal property, and was licensed to conduct such business by the Bureau of Licenses of New York City. Petitioner continued in corporate form a business that was established in 1824" (R. 26).

The business of the petitioner was conducted on a rather large scale (See summary of petitioner's activities, for the taxable years involved, at page 26 of the Record).

The petitioner maintains that it was and is entirely a business corporation in active operation. It has never conducted any business other than that of a pawnbroker. Nevertheless the respondent asserted deficiencies for alleged personal holding company surtax liability and, in addition, 25 per cent penalties for failure to file personal holding company returns. These amounts were summarized by the Board of Tax Appeals (R. 25) in the following manner:

Year	Deficiency	Penalty
1934	$19,563.02	$4,890.76
1935	29,355.07	7,338.77
1936	2,731.97	682.99

The full amount of the aforesaid asserted deficiencies and penalties was appealed herein, but, as has been seen, *supra*, the order granting certiorari limited the review to the asserted liability of the petitioner for penalties for failure to file Form 1120-H (personal holding company return).

Specification of Errors

The United States Circuit Court of Appeals for the Second Circuit erred in holding that petitioner, an active operating corporation, was subject to penalties for failure to file personal holding company returns. In addition to the contention of unconstitutionality (violation of the due process clause of the Fifth Article of Amendment to the Constitution), it is further contended that petitioner's disclosures to respondent constituted the equivalent of filing such returns.

ARGUMENT

Upon principle and authority no penalties should be imposed for failure, on the part of a taxpayer, to file a tax return, when Form 1120H is not actually filed, but Form 1120, Form 1096, and Form 1099 are filed and disclose all the facts upon which the Commissioner of Internal Revenue may ascertain the total income tax due. Such was the situation in the cause at bar.

The Board of Tax Appeals found that the petitioner, R. Simpson & Co., Inc., in good faith claimed in its returns that it was not a personal holding company:

> The Board found that Robert C. Simpson, who had been president of petitioner R. Simpson & Co. Inc. since 1932, "did not file personal holding company returns on behalf of petitioner for the taxable years because he thought petitioner was not a holding company within the meaning of section 351" (R. 28).

The Board further found that the returns, filed in due time, showed all the facts necessary for the respondent Commissioner to compute the taxes as a personal holding company obligation:

> "On or before the due dates petitioner filed its complete income and excess profits tax returns, Form 1120, for the taxable years" (R. 27). The Board further found that "Petitioner also filed information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over $300 paid to its stockholders, for the years in question. Petitioner's books and records, which gave some indication that more than 50 percent of its stock was owned by less than five stockholders and disclosed that at least 80 percent of its income was derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years" (R. 27-28).

However, the incomes were returned on Form 1120, for taxing corporations not holding companies, instead of Form 1120H for taxing holding company corporations. In addition Form 1096 and Form 1099 were filed. The Commissioner (upheld by the Board and by the Second Circuit Court of Appeals) drew the legal conclusion that such returns were "no return" and, that hence, he was entitled to determine penalties of 25% for each of the three years involved (1934, 1935 and 1936) under Revenue Act of 1934, Section 291, reading as follows:

> "Sec. 291: Failure to File Return
>
> In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, * * *"

This Honorable Court has unanimously held that where one kind of income taxpayer (corporation) in good faith files a return on a form provided for another kind of tax-

payer (trustee) which return discloses (as in the cause at bar) the facts upon which the Commissioner may compute the income tax actually due from the taxpayer, the return filed is so much a return that it even starts the running of the time within which the Commissioner may assess the tax.

> *Germantown Trust Co.* v. *Com'r. of Int. Rev.*, 309 U. S. 304, 307, 310, 60 S. Ct. 566, 569 84 L. Ed. 770.
>
> (The pertinent language of this High Court and the cases cited, showing the principle to be long recognized are:
>
> "It cannot be said that the petitioner, whether treated as a corporation or not, made no return of the tax imposed by the statute. Its return may have been incomplete in that it failed to compute a tax, but this defect falls short of rendering it no return whatever. *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 180, 55 S. Ct. 127, 130, 79 L. Ed. 264; *Commissioner* v. *Stetson & Ellison Co.* (3 Cir.), 43 F. 2d, 553; *United States* v. *Tillinghast* (1 Cir.), 69 F. 2d, 718; *Mabel Elevator Co.*, 2 B. T. A. 517; *Abraham Werbeloosky*, 8 B. T. A. 442, 446; *Estate of F. M. Stearns*, 16 B. T. A. 889; *J. R. Brewer*, 17 B. T. A. 704." See also *Denman* v. *Motter*, D. C. Kan. 1930, 44 F. 2d, 648, where no form was available and the return was made on plain paper.)

We submit that there is no difference in principle between this Honorable Court's *Germantown* decision and the cause at bar (where one of the class of income taxpayers asserted by the Commissioner to be a holding company filed, in good faith, returns on forms provided for companies not holding companies, which disclose, as they did, the facts necessary to compute the tax due from a holding company), and it was so held in the recent case of *Lane-Wells Co.* v. *Commissioner of Internal Revenue*, 134 F. 2d, 977 (1943) where, writing for a unanimous court, Judge Denman said, at page 979:

> "The Board attempts to distinguish the Germantown case on the ground that though both forms 1120

and 1120H are for income taxpayers under the income tax provisions of the Act of 1934, taxpayer used Form 1120 under a tax imposed on it under Title I of the Act, 26 U. S. C. A. Int. Rev. Acts, page 659 et seq. while taxpayer should have used Form 1120H under a tax imposed by Title 1A, 26 U. S. C. A. Int. Rev. Acts, page 757 et seq. The attempted distinction is that the tax under Title I is a 'separate and distinct tax' from the tax under Title 1A. The distinguishing is not sound. (Even in the Board, Member Van Fossan dissented on this particular ground, saying 43 B. T. A. 463, 470: "I believe this case is controlled by the decision of the Supreme Court in *Germantown Trust Co.* v. *Commissioner*, 309 U. S. 304.) In the Germantown case the fiduciary return on Form 1041 returns income which is for computing a separate and distinct tax either on the trustee or the beneficiary. The tax on either is as much a 'separate and distinct tax' from that on 'associations taxable as corporations' as are separate and distinct taxes on holding companies and companies not holding companies. Both are income taxes imposed by the same Act. The Act makes the statute of limitations (and the penalty for failure to file a return) applicable alike to all classes of returns.

The Treasury Department in 1934 attempted to forestall the rule of the Germantown case, established in 1940, by incorporating in the Regulations providing Form 1120H for holding companies a similar erroneous conclusion of law. This conclusion of law is stated in the Regulations as, 'However, since the surtax imposed under Title 1A is a distinct and separate tax from those imposed under Title I, the making of a return under Title I will not start that period of limitation for assessment of the surtax imposed under Title 1A.' Art. 351-8, Treasury Regulations 86, promulgated under the Revenue Act of 1934.

The respondent's contention is that, despite the holding of the Germantown case, the contrary construction of the law placed *in* a regulation makes the construction of law a *regulation* within the regulatory power of the Secretary of the Treasury. The statement of the proposition answers it. It is the function of the courts and not the Secretary to determine

the legal effect of his Regulations requiring the use of forms for different classes of taxpayers."

The position of the taxpayer in the cause at bar is even stronger than that of the successful taxpayer in the *Lane-Wells* case, for herein there were filed not only Form 1120 but also Forms 1096 and 1099.

Even in the Second Circuit (from which this appeal is taken) one of the most distinguished judges therein—Learned Hand—in the very case which is the only one cited by it in its *per curiam* opinion, in support of imposition of penalties in the case at bar—*O'Sullivan Rubber Co. v. Commissioner* (1941), 120 F. 2d, 845, 849 (a case also involving a 1935 tax year) dissented on this point saying:

> "I agree with my brothers as to all but the penalty; and as to that I also agree not to follow the reasoning in *Noteman* v. *Welch*, 1 Cir., 108 F. 2d 206 (cited by the Board, in support of the penalties in the case at bar, together with the Board decision in *Lane-Wells Co.*, the latter, as has been seen, *supra*, being subsequently overruled by unanimous decision of the Ninth Circuit) because a return is still a return, however misleading it may be. In the absence of fraud no penalty is imposed upon an innocent taxpayer, however he may throw the Commissioner off the track; it falls only upon those who by failing to make any return at all have given him no lead which he can follow up. Given a lead and good faith, it rested upon him to check the return.
>
> For this reason it seems to me that our decision is a triumph of letter over substance. It is true that 'the undistributed adjusted net income' defined by Section 351 (b) (2) and (3) is not the 'net income' used for the base of the normal tax; but it is computed from that income, and the tax is an income tax, and indeed even a 'surtax' *eo nomine*. I can see no reason in substance to distinguish an innocent mistake as to it and an individual's mistake as to his surtax, except that an individual puts both in one return.
>
> The justification for this is that Sec. 351 (c) makes applicable to this surtax all the administrative provi-

sions of Title I; and since that title requires a return, so must Title 1A. Therefore there must be two returns, as the Commissioner has ruled. I raise no doubt as to the propriety of his ruling; but the statute did not compel it. If he had merely added to the return required by Title I the questions necessary for Title IA, it would clearly have been a compliance with Section 351 (c); and certainly no penalty could have been then imposed. We are imposing one only because he has found it administratively convenient to make two bites to this particular cherry. The penalty was not meant for that; it was imposed to punish delinquents; those who either deliberately, or from indifference, made no effort at all to pay their taxes, not those who merely misunderstood duties which they tried to discharge. By recourse to what even grammatically is a bit of by no means an inexorable verbal reasoning we are perverting it from that purpose."

It is thus seen, on principle and authority, that no penalty should have been imposed on the petitioner herein, R. Simpson & Co., Inc. for failure to file a tax return (1120H), the petitioner having filed returns (1120, 1096 and 1099) from which the Commissioner of Internal Revenue was able to ascertain the total tax due.

CONCLUSION

Wherefore it is respectfully submitted that that portion of the judgment herein of the United States Circuit Court of Appeals for the Second Circuit, which imposes a tax penalty, should be reversed and that this petitioner should have such other and further relief in the premises as to this Honorable Court seems meet and just.

Respectfully submitted,

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